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No. 00-8452

IN THE

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTION PRESENTED

Should substantial portions of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) and *Stanford* v. *Kentucky*, 492 U. S. 361 (1989) be overruled in order to create a constitutional categorical exemption from capital punishment for mental retardation?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Death penalty law has undergone a long and painful evolution from its modern origins to its current comparatively settled state. Engrafting a *per se* exemption from capital punishment for mental retardation on to the Eighth Amendment

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

would reopen many old wounds inflicted during the development of death penalty jurisprudence. The current system already protects those for whom a death sentence would be clearly unjust, and, to the extent any further protection is needed, legislation specifying the standards and procedures in advance is a far preferable method for the law to develop in this area. A judicially crafted categorical exemption for capital punishment for those who successfully claim that they are mentally retarded is contrary to the interests of victims and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 16, 1996, the defendant Daryl Atkins and William Jones spent most of the day drinking and smoking marijuana at the house Atkins shared with this father. See *Atkins* v. *Commonwealth*, 510 S. E. 2d 445, 449 (Va. 1999) (*Atkins I*). Later that evening, after Atkins borrowed a gun from a friend, he and Jones went to the convenience store to buy some more beer. Lacking money, Atkins started panhandling. See *ibid.* At around 11:30 p.m., Eric Nesbitt went to the store. When Nesbitt prepared to leave the parking lot in his truck, Atkins hijacked the truck at gunpoint. Jones drove, Atkins was a passenger, and Nesbitt was kept hostage. See *ibid.* They stole $60 from Nesbitt's wallet, and after discovering Nesbitt's bank card, they proceeded to the branch of a local bank where Atkins forced Nesbitt to withdraw $200 from the drive-through ATM. *Ibid.*

Jones then drove the truck to a local school where he and the defendant discussed what to do with Nesbitt. *Ibid.* Jones urged that they just tie Nesbitt up and leave him. Instead, at Atkins' suggestion they drove to a secluded area that he knew. Atkins ordered Nesbitt out of the truck and shot Nesbitt to death. *Id.*, at 449-450. The autopsy showed that Nesbitt had eight different bullet wounds. *Id.*, at 450.

The two were subsequently arrested. Jones testified against Atkins, and Atkins was convicted of capital murder and sentenced to death. *Id.*, at 451, 453. The Virginia Supreme Court affirmed the conviction, see *id.*, at 457, but reversed the sentence because of an improper sentencing verdict form. See *id.*, at 456-457, n. 7. At retrial, Dr. Evan Nelson, a forensic psychologist, testified that the defendant's full scale IQ of 59 meant that he was mildly mentally retarded. *Atkins* v. *Commonwealth*, 534 S. E. 2d 312, 319 (2000) (*Atkins II*). This diagnosis was also based upon the defendant's inability to function independently as compared to the average person. See *ibid.* Dr. Nelson also "admitted that Atkins' capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that Atkins understood that it was wrong to shoot Nesbitt; and that Atkins meets the general criteria for the diagnosis of an antisocial personality disorder." *Ibid.*

The jury also heard the testimony of the state's witness, Dr. Stanton Samenow, a forensic clinical psychologist. *Ibid.* He " 'sharply disagreed' " with Dr. Nelson's diagnosis that the defendant was mildly retarded. He instead concluded that Atkins had at least average intelligence. This conclusion was based upon "Atkins' vocabulary, knowledge of current events, and other factors from the Wechsler Memory Scale, Wechsler Adult Intelligence Scale, and Thematic Appreciation Test." *Ibid.* As one example, Atkins knew that John F. Kennedy was president in 1961. He also knew who was the current governor of Virginia, as well as the last two presidents. *Ibid.*

The defendant was again sentenced to death. See *id.*, at 314. The Virginia Supreme Court affirmed. See *ibid.* The opinion analyzed Atkins' alleged retardation under its proportionality review, where it held that the death sentence was not rendered disproportionate due to the defendant's intelligence. See *id.*, at 321. This Court granted certiorari on September 25, 2001.

SUMMARY OF ARGUMENT

At this late stage, this Court should not upset its capital punishment jurisprudence. From its fractured origins in *Furman* v. *Georgia*, Eighth Amendment death penalty law has gone through a long and painful development. It has now matured into a comparatively stable body of law. Accepting the defendant's arguments would reopen many of the wounds inflicted since *Furman*.

One of the foremost costs of *Furman*'s legacy is complexity. Death penalty law's extraordinary complexity makes it difficult for courts and legislatures to anticipate changes in the law, and hinders the recruitment of attorneys to represent capital defendants. Developing such a complex body of law necessarily led to many reversals as states failed to anticipate changes in doctrine. Burdensome retrials, frustrated deserts, and additional murders are all a legacy of the law since *Furman*. The frequent reversal of sentences due to a failure to foresee unforeseeable changes in the law also injected an arbitrariness into the system that *Furman* was intended to minimize.

Federalism has paid a heavy price for establishing *Furman*'s legacy. Massive federal regulation of the apex of state criminal law wounds federalism. Federalism is further harmed as states understandably overreact to the Eighth Amendment cases, such as declining to regulate the admissibility of mitigating evidence.

Fortunately, most of these costs have now been paid, as death penalty law is now stable. Legislatures and courts now know how to establish a capital punishment system that will withstand constitutional scrutiny. Even the tension between the narrowing and the individualized sentencing lines may be abating.

Creating a categorical exemption for mental retardation carries costs similar to those associated with the aftermath of *Furman*. Foremost is the damage to precedent. Substantial portions of *Penry* v. *Lynaugh* and *Stanford* v. *Kentucky* would

have to be overruled in order to fashion the exemption. There is no new national consensus against applying capital punishment to the mentally retarded. Under current law a consensus can only be found when an overwhelming majority of legislatures condemn a particular punishment or procedure. Since a majority of states with capital punishment do not exempt the mentally retarded, there can be no new consensus without overruling *Penry I* and *Stanford*.

Accepting the defendant's argument would also cause considerable disruption to death penalty systems. Under *Penry I*, any exemption for retardation would be fully retroactive on collateral review. Courts will therefore be inundated with retardation claims.

Finally, the categorical exemption would make death penalty law more complex and arbitrary. Instead of being treated like any other mitigating evidence, mental retardation claims will now require much more procedural complexity: a new standard of proof, an additional hearing, and new procedures to govern the hearing.

Arbitrariness will increase in two ways. First, the inevitable reversals in states that failed to anticipate this change repeats the arbitrariness that accompanied the developments since *Furman*. Additionally, setting the standard for determining something as imprecise as mental retardation necessarily involves drawing an arbitrary line between those who are and are not exempt on the basis of their intelligence.

A judicially created exemption from capital punishment gives little additional protection to those for whom the death penalty would be clearly unjust. The insanity defense, competency to stand trial, and the prohibition against executing the insane all protect the most retarded defendants from capital punishment. Further protection is provided through the defendant's right to present evidence of mental retardation as mitigating evidence and to have the jury instructed to consider it in mitigation. Only those defendants who could not other-

wise avoid a death sentence would benefit from overturning *Penry I* and *Stanford*. Treating all mentally retarded defendants as one undifferentiated mass also contradicts the principle of individualized sentencing.

In the event that the defendant's claim is accepted, then the rules and procedures for determining mental retardation should be governed by due process rather than the Eighth Amendment. If the Eighth Amendment governs, then any rule favorable to the prosecution that varies from the norm will be attacked under the "evolving standards of decency" test. Since states can freely depart from the majority rule to favor the defense, Eighth Amendment scrutiny will lead state rules to a lowest common denominator in favor of the defendant. What must be avoided is invoking the Eighth Amendment to force a procedure on the states, which have not written any rules on the subject, or, even worse, to craft a judicially created set of procedures and use them to attack the very statutes that created the "consensus" for the underlying rule in the first place.

This threat is all too real. State statutes used as examples of the evolving standards of decency in one case were successfully attacked in later cases as violating some newer standard. Since there is considerable variation among current state procedures governing retardation exemptions, there will be many opportunities for Eighth Amendment litigation.

Due process allows the state experimentation that is the hallmark of our federalism. It is also how this Court treats procedures governing the prohibition against executing the insane. The best way to preserve federalism and keep courts from being inundated with even more Eighth Amendment claims is to adopt the deferential due process standard.

ARGUMENT

I. The Court should not unsettle its capital punishment jurisprudence at this late stage.

From its fractured origins in *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court's capital punishment jurisprudence has matured into a comparatively stable body of law. Although tensions remain, legislatures now have a good idea how to write constitutional death penalty statutes, and courts know how to apply them.

Accepting the defendant's arguments would needlessly upset this system. In order to categorically exempt from capital punishment any person who tests as mentally retarded, the Court must overrule important parts of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) and *Stanford* v. *Kentucky*, 492 U. S. 361 (1989). Nothing in this case warrants such a disruption of the important and complex body of law surrounding capital punishment. Defendant's desired result will provide little additional aid to those for whom the death penalty is clearly unjust, but it would entail considerable cost. Since there is no "special justification" for departing from these precedents, cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (internal quotation marks omitted), *Penry* and *Stanford* should not be overruled.

A. The Legacy.

Few areas of constitutional law have been as contested or as complex as modern capital punishment jurisprudence. Starting with *Furman* v. *Georgia*, *supra*, the longest and one of the most divided opinions in the United States Reports, see Steiker & Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 362 (1995), this Court's death penalty opinions have followed a labyrinthine path to the current, comparatively settled body of law. These opinions have created a unique set of procedures for capital cases that "are extensive

and complex." 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.1(b), p. 698 (2d ed. 1999). While these procedures may now strike an appropriate balance between Eighth Amendment interests and respect for state criminal justice systems, see Bilionis, Legitimating Death, 91 Mich. L. Rev. 1643, 1680 (1993), this equilibrium came at considerable cost. In addition to its complexity, the torturous path from *Furman* has burdened society with the needless retrial or release of some of our worst criminals, burdened federalism in a crucial area, and at times has promoted the very arbitrariness condemned by *Furman*. Any major expansion of the death penalty defendant's Eighth Amendment rights would reopen this can of worms. At this stage, there is no need to reinflict the wounds of the last 30 years.

A substantial cost of developing modern death penalty law is the difficulty of figuring it out and complying with it. The law's complexity is a weapon for capital defendants to frustrate their deserts. See *Richmond* v. *Lewis*, 506 U. S. 40, 54 (1992) (Scalia, J., dissenting). It also harms capital defendants by restricting the pool of available lawyers. "[T]he jurisprudence of death is so complex, so esoteric, so harrowing, this is one area where there aren't nearly enough lawyers willing and able to handle all the current cases." Kozinski & Gallagher, For an Honest Death Penalty, N. Y. Times, Mar. 8, 1995, p. A21, col. 1.

Developing such extensive regulations carries other costs as well. Courts and legislatures have had considerable difficulty in applying these decisions and in anticipating developments in death penalty law. An obvious example is found in the initial reaction to *Furman*. *Furman* provided very little guidance to state legislatures on how to write capital punishment statutes that complied with the Eighth Amendment. "But identifying the 'concerns' of *Furman* is a daunting task . . . . The opinions presented a staggering array of arguments for and against the constitutionality of the death penalty and offered little means, aside from shrewd political prediction of determining which

arguments would dominate in the decision of any future cases." Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 362. "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett* v. *Ohio*, 438 U. S. 586, 599 (1978) (plurality). Responding to the concern with arbitrariness that ran through the *Furman* opinions, see *Graham* v. *Collins*, 506 U. S. 461, 483 (1993) (Thomas, J., concurring) (summarizing opinions), several states enacted mandatory death penalty statutes in order to foreclose arbitrariness. See *Lockett*, *supra*, at 599-600. Four years after *Furman*, this Court decided that these states were wrong, invalidating their mandatory statutes and striking down numerous death sentences. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325, 336 (1976). This result was itself arbitrary. Given no real guidance, several state legislatures simply guessed wrong as to what this Court would require. As a result, numerous deserving defendants avoided their punishment, as all existing death sentences in these states were wiped out for the second time in four years. Each additional layer of complexity added to capital jurisprudence carries the risk of similar arbitrariness as defendants' punishments are determined by the ability of courts and legislatures to predict the next twist in this winding road.

Unfortunately, there are many other examples of the disruption caused by the development of the Eighth Amendment death penalty jurisprudence. The *Lockett* plurality sought to give "the clearest guidance that the Court can provide" through its holding. 438 U. S., at 602. Few promises from this Court have been less fulfilled. Its premise, that the sentencer in capital cases must not be prevented "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense," *id.*, at 605, opened a Pandora's box for the legislatures, courts, and prosecutors left to implement it.

The explosive growth of *Lockett*'s individualized sentencing branch of the post-*Furman* cases is well documented. See, *e.g.*, McAllister, The Problem of Implementing a Constitutional System of Capital Punishment, 43 Kan. L. Rev. 1039, 1057-1060 (1995) (describing cases); *id.*, at 1065 ("the virtually limitless expansion of the individualized sentencing principle"). *Lockett*, and this Court's numerous interpretations of its principles, see, *e.g.*, 5 W. LaFave, J. Israel, & N. King, *supra*, § 26.1(b), at 700, n. 17, led to the reversal of many death sentences where legislatures and courts failed to anticipate these sudden shifts in the Court's death penalty law. Since the *Lockett* "Court did not attempt to define the range of mitigating evidence encompassed by the individualization requirement," see Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 390, years of "intricate litigation over states' fulfillment" of it was inevitable. See *ibid.* The result was a morass of confusion, reversals, and retrials. CJLF's survey of habeas reversals of state capital cases in the Eleventh Circuit found *Lockett* to be the single largest source of the reversals. See K. Scheidegger, Rethinking Habeas Corpus 36 (1989), reprinted in Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 212, 251 (1991).

These and other reversals led to numerous expensive retrials. Many capital defendants subsequently escaped their sentence, whether from unsuccessful attempts at retrial or the wholesale invalidation of state death penalty schemes. In addition to frustrating the will of many juries, this also cost innocent people their lives. "The death penalty does, however, undeniably serve as a deterrent in one respect: once the sentence is carried out, the recidivism is quite low. And, the simple fact is, people sentenced to life in prison without parole, or even to a death sentence, do, occasionally, get out and do it again." Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 25 (1995).

Federalism also paid a heavy price for establishing *Furman*'s legacy. Criminal law is primarily a state matter. See, *e.g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991); *Argersinger* v. *Hamlin*, 407 U. S. 25, 38 (1972). By addressing the most serious crimes with the most serious penalty, capital punishment sits at the apex of a state's criminal justice system. While the Eighth Amendment has some hold over this most important part of criminal justice, see *Payne*, 501 U. S., at 824, the detailed set of regulations erected by this Court since *Furman* substantially limits legitimate state sovereignty. Besides the extensive regulations mandated by this Court, federalism is further impaired by the state legislatures' understandable overreaction to these decisions. Thus, "the Court's emerging doctrine has motivated every death penalty jurisdiction to permit the introduction and consideration of 'any' mitigating factor," see Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 391, even though the Eighth Amendment does not actually require this. See, *e.g.*, *Walton* v. *Arizona*, 497 U. S. 639, 652 (1990) ("there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty") (internal quotation marks omitted); *Boyde* v. *California*, 494 U. S. 370, 377 (1990). Having been burned many times before, states are afraid to conduct the experimentation in this field that forms the heart of federalism.

Many of these costs have now been paid. The uncertainty and instability that plagued much of the post-*Furman* era is nearly gone. In its place is a mature, stable body of law. With regard to its narrowing requirement, "[t]he relevant Eighth Amendment law is well-defined." *Richmond* v. *Lewis*, 506 U. S. 40, 46 (1992). Similarly, for the individualized sentencing requirement, cases like *Boyde* v. *California*, *supra*, *Saffle* v. *Parks*, 494 U. S. 484 (1990), and *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), have "brought a measure of formulaic simplicity to this concern as well." Bilionis, *supra*, 91 Mich. L. Rev., at 1653-1654. Since all the states now freely

admit mitigating evidence, "virtually all of the current litigation concerning the individualization requirement is backward-looking, gauging the constitutionality of statutory provisions and state practices that are no longer in force." Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 390. Even the famous tension between these two lines may be abating. Justice Thomas has sketched out a compromise position between these competing requirements. See *Graham*, 506 U. S., at 498-499 (Thomas, J., concurring). Although it involves an admittedly narrow reading of the *Lockett-Eddings* line, *id.*, at 490, it is consistent with the spirit of *Furman*.

The long road from *Furman* has reached a balance between the need to insure that capital punishment is enforced both rationally and equitably and the states' legitimate interest in enforcing the death penalty. This achievement has come at considerable cost, and should not be disturbed without substantial justification. As the next section demonstrates, accepting the defendant's arguments would cause such a disturbance.

B. The Cost.

Creating a constitutional categorical exemption from capital punishment for mental retardation carries considerable costs. It would involve a disregard for precedent, a disruption of capital sentencing schemes, the creation of additional complexity, and the attendant arbitrariness that is all too similar to the turmoil associated with the aftermath of *Furman* v. *Georgia*. Any decision concerning the defendant's request must take these costs into account.

1. Precedent.

The clearest cost of a *per se* exemption from capital punishment for mental retardation is the damage to precedent. In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*), this Court declined to create this categorical exemption from the death penalty. Since only two states prohibited executing the

mentally retarded there was no national consensus that required extending that ban to all other states. See *id.*, at 334.

Penry I's analysis still holds. It is true that more states now bar the execution of the mentally retarded than when *Penry I* was decided. But even the defendant's claim that 18 states with capital punishment and the federal government now bar the execution of the retarded does not support a different result. While it is possible to forge a new consensus under the "evolving standards of decency" strand of Eighth Amendment analysis, the defendant bears a "heavy burden" of establishing a consensus against a practice. See *Stanford* v. *Kentucky*, 492 U. S. 361, 373 (1989).

The defendant has not met that burden. His requested change instead is revolutionary, not evolutionary. *Penry I* and other cases demonstrate that the consensus of other state legislatures must be overwhelming before the few remaining states are forced to conform. It noted that when this Court held that the Eighth Amendment forbids executing the insane, no state permitted that practice. See *Penry I*, 492 U. S., at 334; *Ford* v. *Wainwright*, 477 U. S. 399, 408, n. 2 (1986). *Stanford* reinforces the importance of proceeding cautiously when evaluating a claim that national consensus against some punishment has reached constitutional proportions. In deciding that the Eighth Amendment did not bar executing someone who was 16 or 17 when the crime was committed, this Court held that 15 states with capital punishment forbidding this practice did "not establish the degree of national consensus" to support a finding of cruel and unusual punishment. *Stanford*, 492 U. S., at 371. As the *Stanford* Court noted, prior examples of striking down a practice under the national consensus theory had an overwhelming majority of states opposed to the relevant practice. The four examples given by the *Stanford* Court of an appropriate national consensus had either no state applying the relevant punishment, see *Ford*, 477 U. S., at 408 (insanity), only one state applying it, see *Coker* v. *Georgia*, 433 U. S. 584, 595-596 (1977) (plurality) (rape of adult woman); *Solem* v.

Helm, 463 U. S. 277, 300 (1983) (life without possibility of parole for minor offense), or eight states utilizing the punishment, see *Enmund* v. *Florida*, 458 U. S. 782, 792 (1982) (death for robbery in which accomplice kills). See *Stanford*, 492 U. S., at 371. Similarly, this Court has indicated that even if a majority of states followed a practice, that practice was not necessarily imposed on the other states under the Eighth Amendment. See *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984).

Amicus suggests that any national consensus must be at least as pervasive as in *Enmund* before it can be considered for being enshrined in the Eighth Amendment. Although this Court makes the final determination under the Eighth Amendment, the judgments of state legislatures and courts will "weigh heavily in the balance . . . ," see *Enmund*, 458 U. S., at 797, because there are no other appropriate indicators for this amorphous standard. If "emerging national consensus" is to mean something other than a byword for the Justices' own preferences, then the opinions of state legislatures must be listened to as the best objective source available. However, federalism and the integrity of state punishment systems both counsel against the aggressive use of such evidence.

Ordinarily, the Constitution does not impose a uniform approach by the states to any particular problem. Allowing a state to deviate from the majority rule of the other states is a hallmark of our federalism. Thus, "the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). As Justice Brandeis' famous dissent noted, each individual state must be allowed to serve as "a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

Counting noses among the state legislatures and routinely forbidding those practices which come a few votes short threatens innovation by punishing states for varying from the

norm. Except for extraordinary circumstances like the reaction to *Furman*, see Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 107 (1987), any finding by this Court that there is an emerging consensus against a particular practice is likely to be irreversible. A state wishing to reverse such a finding by forming a new consensus will be in a bind, as any sentences imposed contrary to the newly found consensus would be quickly struck down. Unless a considerable number of states act in concert to reverse the consensus, this Court's decision to strike down a particular practice is likely to stick.

This problem is compounded by the fact that the emerging national consensus doctrine can only be used to strike down sentences. States may freely vary from the consensus and forbid a punishment or procedure favored by most states. The reaction of some state legislatures to *Penry I* is one example. While the Eighth Amendment may forbid a punishment, it will not mandate states to act more harshly against offenders. Therefore, an aggressive use of the national consensus doctrine would lead to a rapid race to minimize punishments and impose procedural restraints upon the states. While punishments could be easily struck down, innovations favoring punishment would be hard to introduce and previously struck-down punishments would be almost impossible to rehabilitate. For example, Nevada's attempt to test *Woodson*'s limits by enacting a mandatory death sentence for murder by a life-term inmate was struck down in *Sumner* v. *Shuman*, 483 U. S. 66, 77-78 (1987). Any attempt to restore this innovation would require numerous states to act in concert. A state that wishes to act alone in having a mandatory death sentence for repeat murderers will be stymied in court. Such a system is thus not simply a burden to federalism, but also threatens the entire capital punishment system. Requiring an overwhelming consensus to invalidate a practice places an important limit on a potentially dangerous doctrine.

The defendant has not found this consensus. According to his figures, only 18 of the 38 states with capital punishment exempt the mentally retarded. See Brief for Petitioner 39.[2] Even adding the federal government to the "anti"side does not change the fact that a majority of the jurisdictions with capital punishment do not categorically exempt the mentally retarded. Even this addition is dubious. The federal standard for mental retardation is "lacks the mental capacity to understand the death penalty and why it was imposed on that person." 18 U. S. C. § 3596(c). This is the *Ford* competency standard applied to mental retardation. See *Penry I*, 492 U. S., at 333. Accepting the defendant's argument would require another standard. Since the defendant cannot even muster a majority of the states against his sentence, let alone a supermajority, his argument fails under *Penry* and *Stanford*.

Implicitly recognizing the weakness of his position, the defendant attempts to bolster his cause by invoking an argument previously rejected by this Court. His attempt to add the 12 states banning the death penalty to his total in order to find a majority for a categorical exclusion, see Brief for Petitioner 39, contradicts *Stanford*. The *Stanford* Court specifically rejected the relevance of counting the anti-death penalty states in any consensus concerning the administration of capital punishment. See 492 U. S., at 370, n. 2. Try as he might, the defendant cannot properly characterize this rejection as dicta. See Brief for Petitioner 39, n. 44. The difference between *Stanford* and the present case is small, with 15 states opposing executing juvenile offenders in *Stanford* and 18 opposed to executing the retarded in the present case. Adding the states opposed to the death penalty shrinks the difference between *Stanford* and this case, since two fewer states now prohibit the death penalty than when *Stanford* was decided. Compare

2. Virginia properly contests this number. See Brief for Respondent, Part II B. Even if the defendant's count is accepted, he still has not forged a consensus as defined in *Stanford*.

Stanford, 492 U. S., at 371, n. 2, with Brief for Petitioner 39. Since the jurisdiction count in the two cases is essentially the same, finding a consensus against executing the retarded in this case would at the very least require overruling the analysis used in *Stanford*.

2. Disruption.

Accepting the defendant's claim would also cause considerable disruption to state capital punishment systems. *Penry I* held that a categorical exemption from punishment for mental retardation would apply retroactively on collateral review under the first exception to *Teague* v. *Lane*, 489 U. S. 288 (1989), even though it would be a new rule. See *Penry I*, 492 U. S., at 330. Unless this holding of *Penry I* were also overruled, every death row inmate who presented at the penalty phase at least some evidence that he was retarded would be entitled to a new trial to determine whether he was now exempt from his death sentence. This only begins the disruption. Because retardation claims would apply retroactively on federal habeas, they would also be exempt from limits on successive habeas petitions or on default for failing to develop facts in state court. See 28 U. S. C. §§ 2244(b)(2)(A), 2254(e)(2)(A)(i). Therefore, *any* death row inmate could try to raise a retardation claim on federal habeas. Since a diagnosis of retardation is more subjective and therefore more subject to falsification than a diagnosis of the measles, the federal and state courts risk being inundated by the claims of death row inmates utilizing a new weapon in their arsenal of delay. As in the aftermath of *Furman*, many well-deserved death sentences would be set aside. See *supra*, at 10. Even in cases where the malingerers are identified as such, the process will further delay the already overdue process of capital punishment.

3. Complexity.

Any change from the current treatment of mental retardation will complicate death penalty procedure. Retardation is now treated like any other form of specialized mitigating evidence. The defense presents its claim to the jury through expert witnesses, and the prosecution attempts to rebut through cross-examination and its own experts. See, *e.g.*, J. A. 617-619.

Under the defendant's new regime, courts and legislatures would now have to craft a definition of mental retardation separate from the legal definition of insanity. "Mental age" is unacceptable since IQ scores usually stop rising after 16. See *Penry I*, 492 U. S., at 339. Since the average mental age is 16 years, eight months, any standard that defines the average criminal defendant as a juvenile is unacceptable. See *In re Ramon M.*, 22 Cal. 3d 419, 429, 584 P. 2d 524, 531 (1978). Simple IQ is no better. As the defendant's expert acknowledged, a diagnosis of retardation cannot be based solely upon IQ score, but also involves the individual's inability to function independently. See J. A. 618; accord American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000, text revision) ("DSM IV-TR"). The inability to function criterion involves "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, homeliving, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM IV-TR at 41. These skill assessments may be given much greater weight than raw IQ scores in certain cases. See *id.*, at 42. Thus, individuals with IQ scores above the retarded level may be diagnosed as retarded while those with scores below the retarded level can be classified as not retarded on the basis of their adaptive behavior. See *ibid.* Any standard must incorporate this subjective determination into a legal standard. Cf. *id.*, at xxxvii (recognition as a diagnostic category does not imply that the condition meets legal criteria).

This new standard will be accompanied by a new finding. At the very least, the sentencer must be given the option of rendering a separate verdict of mentally retarded. Since the issue of retardation will now be divorced from the defendant's overall culpability, a separate hearing will probably be necessary in order to minimize juror confusion. Accompanying the new standards and hearings will be many additional state procedures. While these procedures should not be federalized beyond basic due process, see part II, *infra*, the additional rules and procedures will further complicate an already complex body of law.

4. Arbitrariness.

Finally, judicially creating an exemption for mental retardation claims injects arbitrariness into the death penalty. The disruption associated with the change creates its own arbitrariness. As in the aftermath of *Furman*, *Lockett*, or *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), the death penalty will not be rendered just on the basis of desert, but will also be influenced by how well state legislatures and courts anticipate the newest pronouncements from this Court. This is itself arbitrary and was a significant cost of the development of the law from *Furman*. See *supra*, at 9. Accepting the defendant's claim will reopen some of these wounds.

Determining who is mentally retarded also adds randomness to capital punishment. False positives are a common problem in mental retardation testing. Cultural bias is one likely culprit. See Garcia & Steele, Mentally Retarded Offenders in the Criminal Justice System and Mental Retardation Services in Florida: Philosophical Placement and Treatment Issues, 41 Ark. L. Rev. 809, 815 (1988). This is a particular problem for poor people and ethnic minorities. See *ibid.* Thus, while "several studies show mentally retarded offenders are disproportionately members of minority/ethnic groups . . . . [m]ost authors acknowledge the meaningfulness of this data must be tempered by consideration of cultural biases in the tests often

used to assess intelligence and by the effects of the offender's environment and cultural milieu." *Id.*, at 817-818; see also DSM IV-TR, *supra*, at 46 ("Care should be taken to ensure that intellectual testing procedures reflect adequate attention to the individual's ethnic cultural or linguistic background.").

There can be no greater affront to the principles of *Furman* than having the death penalty determination influenced by race or class. Although the bias in intelligence testing favors those traditionally thought to be disadvantaged in capital punishment, two wrongs do not make a right. The race-based arbitrariness that motivated *Furman*, see *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring) should not be reintroduced by this Court, even in an allegedly more benign form. While it may be impossible to eliminate all arbitrariness in any human endeavor, this Court should avoid injecting unnecessary caprice, particularly with regard to class or race, into capital sentencing.

C. The Bargain.

Establishing a new judicially created categorical exemption from capital punishment for those who successfully claim that they are mentally retarded is unnecessary. The current system protects those for whom a death sentence would be clearly unjust. The most retarded are unlikely to be competent to stand trial. See *Dusky* v. *United States*, 362 U. S. 402 (1960) (*per curiam*). The insanity defense provides further protection. *Ford* v. *Wainwright*, 477 U. S. 399 (1986) also protects the most retarded from the death penalty. See *Penry I*, 492 U. S., at 333. The rule proposed in the present case is not needed to protect the most severely mentally retarded.

The defendant's proposal is for the marginal cases—the mildly or moderately retarded and, inevitably, the malingering. These are people who are capable of understanding the wrongfulness of their conduct. See *Penry I*, 492 U. S., at 338 (O'Connor, J., concurring). Thus, as even the defendant's

expert admitted, the defendant knew that it was wrong to shoot Nesbitt. See J. A. 618.

Since a categorical retardation exemption would only benefit those in the gray zone, it is unsurprising that the cases raising this claim typically involve defendants whose claim to retardation is hotly disputed. See, *e.g.*, J. A. 618-619; see Supplement to Joint Appendix in *McCarver* v. *North Carolina*, No. 00-8727, p. 160sa (cert. dismissed as improvidently granted); Brief for Respondent in *Penry* v. *Johnson*, No. 00-6677, pp. 6-7. These defendants already have the benefit of presenting their alleged retardation as mitigating evidence to the sentencer, and having the sentencer instructed to consider it. See *Penry* v. *Johnson*, 532 U. S. 782, 150 L. Ed. 2d 9, 25, 121 S. Ct. 1910, 1920-1921 (2001) (*Penry II*). As with the more severely retarded, the most deserving retarded defendants will avoid the death sentence at the penalty phase when the sentencer relies on the mental retardation to mitigate the sentence. The defendant's claim that sentencing juries may not be able to appreciate the mitigating effect of mental retardation, see Brief for Petitioner 34-35, is why this evidence is presented through expert testimony. *Amicus* knows of no other evidence that is placed beyond every jury's grasp because it is too complex even with expert testimony.

The defendant's proposal will only benefit those who claim to be retarded but cannot otherwise avoid capital punishment for their crimes. These will be defendants whose intelligence is borderline or whose crimes display exceptional cruelty outweighing that mitigation. In order to exempt these cases, this Court would have to undo the capital punishment system it has developed, and inflict again the disrespect for precedent, the disruption, the complexity, and the arbitrariness that came with *Furman*.

By treating the retarded as an undifferentiated mass, the categorical exemption would cause additional harm to the capital punishment system and the mentally retarded. The mentally retarded are not homogenous. "Mentally retarded

persons are *individuals* whose abilities and experiences can vary greatly." *Penry I*, 492 U. S., at 338 (opinion of O'Connor, J.) (emphasis added). "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition can never act with the level of culpability associated with the death penalty." *Id.*, at 338-339. Therefore, "[n]o specific personality and behavioral features are uniquely associated with Mental Retardation." DSM IV-TR, *supra*, at 44.

Treating defendants as individuals is the foundation of the mitigating line of cases. The problem with a mandatory penalty statute is that "[i]t treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality). Thus all repeat murderers must be treated as individuals, and cannot be subject to a mandatory death sentence. See *Sumner* v. *Shuman*, 483 U. S. 66, 85 (1987). A blind exemption from death is no better. If repeat murderers are to be treated as individuals, then so should the mentally retarded. The defendant's proposed exemption is an affront to the concept of individualized sentencing.

"So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case." *Penry I*, 492 U. S., at 340 (O'Connor, J.). The intervening years have not altered this situation. See *supra*, at 16. The current treatment of mental retardation has not been eroded by subsequent developments, nor has it been difficult to use. Indeed, the categorical exemption will make the law more complex and harder to follow. See part I B 3. In short, there is no good reason to depart from precedent. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854-855 (1992). In

a system where "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable," *id.*, at 854, the beneficial precedents of *Penry I* and *Stanford* should be retained. Given the great costs and small benefit of abandoning these cases, the treatment of mental retardation in capital cases should remain settled.

II. In the event that a categorical exemption for mental retardation is created, the rules and procedures governing that determination should be left to the states.

If this Court chooses to overturn portions of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) and *Stanford* v. *Kentucky*, 492 U. S. 361 (1989) and create a *per se* exemption from capital punishment for the mentally retarded, then it should still try to limit the damage to federalism. States should be allowed to write their own rules governing this issue without the prospect of a set of federally imposed, retroactively altered procedures lurking in the background. This is consistent with both the general deference accorded to the states' power to define their laws, and with this Court's treatment of the most similar circumstance brought before it. What must be avoided is invoking the Eighth Amendment to force the procedures of the states currently banning the execution of the retarded on those states which have not written any rules on that subject, or, even worse, to craft a judicially created set of procedures and use them to attack the very statutes that created the "consensus" for the underlying rule in the first place.

This has happened before. In *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the Court favorably contrasted Florida's death penalty scheme with the North Carolina one struck down in *Woodson*. See *id.*, at 286-287 (plurality). Although it served as an exemplar in *Woodson*, the Florida scheme was not saved from attacks based on subsequent decisions that favored the defense. *Lockett* v. *Ohio*, 438 U. S. 586 (1978) extended

Woodson's individualization requirement into a broad right for the capital defendant to present virtually any type of mitigating evidence to the sentencer. See *id.*, at 604-605 (plurality). *Lockett* was then used to invalidate Florida's statutory limits on mitigating evidence. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 399 (1987). The Eighth Amendment, as it is currently interpreted, is a slippery slope even for those states that provide the example of appropriate procedures.

Current statutory exemptions for the mentally retarded will provide plenty of fuel for litigation if the defendant's argument is accepted. For example, at least one state requires the defendant to prove mental retardation by clear and convincing evidence. See, *e.g.*, Colo. Rev. Stat. § 169-402(2). Any standard greater than a preponderance will be attacked. Similarly, states which limit claims to those defendants who have manifested mental retardation by a certain age, see, *e.g.*, Ark. Code § 5-4-618(a)(2); Md. Ann. Code, Art. 27, § 412(f)(3), will be attacked for improperly limiting the defense. Jurisdictions also vary considerably in how mental retardation is defined. See, *e.g.*, 18 U. S. C. § 3596(c) ("lacks the mental capacity to understand the death penalty and why it was imposed on that person"); Ark. Code § 5-4-618 ("[s]ignificantly subaverage intellectual functioning accompanied by significant deficits or impairments in adaptive functioning"); Ky. Rev. Stat. § 532.130(2) (IQ below 70). Any attempt to narrow the definition will be attacked. The possibilities for litigation are nearly endless if the Eighth Amendment is allowed to govern.

Having the Eighth Amendment govern the procedures for determining mental retardation claims will stifle state innovation in this field. The "evolving standards of decency," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality), line of cases can place considerable pressure on states to conform to the current majority rule. Since this Court first looks to the views of other state legislatures in determining whether a practice offends the *Trop* standard, see *McCleskey* v. *Kemp*, 481 U. S. 279, 300

(1987), states that vary from the majority rule risk reversal of their sentences. See *supra*, at 15.

One way to alleviate this problem is to require at least an overwhelming majority of the states to condemn a particular practice before finding an Eighth Amendment violation. See *supra*, at 13-14. This safety net will be gone if this Court accepts a categorical exemption for mental retardation, since a majority of the states with capital punishment do not recognize that exemption. See *supra*, at 16. Removing the super-majority restraint from the "contemporary standards of decency" analysis could quickly constitutionalize the procedures for determining retardation claims. Any state procedures that varied from those adopted by the largest number of states would invite Eighth Amendment attack. The cost of litigation and threat of reversed sentences will give the states considerable incentives to conform to the broadest version of the procedures.

The Eighth Amendment should not bludgeon the states into procedural conformity on any issue. "The essence of federalism is that the states must be free to develop a variety of solutions to problems and not be forced into a common uniform mold." *Addington* v. *Texas*, 441 U. S. 418, 431 (1979). Although *Addington* addressed due process and the civil commitment procedures, the Eighth Amendment is not different. "To [accept the defendant's argument] would . . . place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). Therefore, the fact that a majority of the states follow a particular procedure does not require the other states to follow suit under the emerging national consensus standard. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. . . . ¶ As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984).

This Court showed similar deference when dealing with the execution of the allegedly insane. In *Ford* v. *Wainwright*, 477 U. S. 399, 401 (1986), it stated that executing the insane violated the Eighth Amendment. Since no state ever followed that practice, the real issue in *Ford* was what procedure the Constitution requires when a state is confronted with a claim of insanity by a death row inmate. See *id.*, at 431 (Rehnquist, J., dissenting). While a majority of the Court found fault with Florida's procedures, it also gave considerable deference to the states to implement their own standards for resolving insanity claims.

Thus, while the plurality sought some sort of adversarial hearing, see *id.*, at 417, the states would have considerable freedom in how to implement this directive. "[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.*, at 416-417. Justice Powell's concurrence is even more important. He noted that the real issue here was whether the Florida procedures "comport with the requirements of due process." *Id.*, at 424. He differed from the plurality on the extent of the necessary procedures. Justice Powell held that the plurality's "kind of full-scale 'sanity trial' " was unnecessary, and that due process could be satisfied by considerably less elaborate procedures. See *id.*, at 425. However, Justice Powell did not differ substantially from the majority in the deference accorded to the states' freedom to implement their own procedures. "Beyond [a few] basic requirements, the States should have substantial leeway to determine what process best balances the

various interests at stake." *Id.*, at 427. No more than "basic fairness" was required. See *ibid.*[3]

As the narrowest opinion, Justice Powell's opinion provides *Ford*'s holding. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). If this Court accepts the defendant's arguments, then the Powell concurrence should govern. The procedures used to determine claims of mental retardation should only have to satisfy due process. If it chooses, a state may adopt procedures similar to those used in determining competency to stand trial, see *Ford*, 477 U. S., at 417, n. 4 (plurality), but no particular procedures are required. Since the defendant has already been found guilty and competent to stand trial, the state should be allowed to require the defendant to prove his mental retardation by clear and convincing evidence. Cf. *id.*, at 426, and n. 6 (Powell, J., concurring). States should also have broad latitude to define retardation, including as a minimum the definitions in *any* of the statutes used to form the "consensus."

Fashioning an exemption from execution for mental retardation will place additional stress on state capital punishment systems. Capital defendants will have considerable incentive to abuse this hard-to-define but potentially very strong defense. Elaborate, constitutionally mandated procedures will threaten to overwhelm capital trials and appeals with more unwanted complexity. Even those states that currently exempt the mentally retarded will see their systems subjected to Eighth Amendment attack. Federalism in this most important aspect of criminal law will take yet another blow. The best way to minimize these and other problems is to give the states the considerable flexibility afforded by due process.

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3. Justice O'Connor's concurrence and dissent held that while there was no Eighth Amendment exemption from execution for insanity, Florida law created a "protected liberty interest in avoiding execution while incompetent," which Florida did not adequately protect. See *id.*, at 427. While this mode of analysis is not particularly relevant to the present case, the opinion also gave the states "broad latitude" to satisfy due process. See *id.*, at 429.

CONCLUSION

The decision of the Virginia Supreme Court should be affirmed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation